



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 819 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 7th June 2017)

JACK OTIENO BONDE.....CLAIMANT

VERSUS

MIMOSA COURT MANAGEMENT LIMITED.....RESPONDENT

RULING

1. The Application before Court is dated 1st February, 2017, brought under Sections 62, 76, 77, 80 and 81 of the Labour Relations Act, Section 87 of the Employment Act, Section 12 Industrial Court Act 2011 and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016 and all enabling provisions of the law and inherent Powers of the Court. They seeks for Orders:

1. That the application be certified as urgent and be heard exparte in the first instance.

2. That the Honorable Court be pleased to stay the proclamation and attachment of the Respondent's property by the Claimant whether by herself, representatives, employees, agents, servants or other persons acting on her behalf or claiming through her, and any other proceedings and execution pending hearing and determination of this application.

3. That pending hearing and determination of this application, this Honourable Court be pleased to issue a temporary stay of execution of the judgment delivered on 11th May, 2016 and all consequential Orders thereto.

4. That pending the hearing and determination of the Applicant's application for review dated 3.8.2016, there be a stay of execution of judgment delivered on 11th May, 2016, and all consequential Orders thereto.

5. That the costs of this application follow the results of the application for review.

2. The Application is premised on the grounds:

1. That the Applicant is aggrieved by the Judgment of the Honourable Court delivered on 11th May, 2016, and has filed an application for review against the order for costs.

2. That the Claimant filed a bill of costs for Kshs. 195,615/= which was later taxed at Kshs.

131,531/=.

3. That the Claimant instructed auctioneers to proclaim the Respondent's moveable property, worth more than Kshs. 141, 981/=.

4. That the Applicant's application for review seeks to reverse the award of costs to the Claimant and will be rendered nugatory if the Claimant is allowed to proceed with execution.

5. That it is in the interest of justice that the Applicant be allowed to ventilate their case in the application for review before the Claimant executes the decree.

6. That unless the Orders sought herein are granted, the Respondent/Applicant stands to suffer irreparable loss and damage since they are required to pay the costs taxed at Kshs. 131,531/= which is the subject of the review application.

7. That it is in the best interest of justice that the stay of execution sought herein be granted pending the hearing and determination of the application for review.

8. That it is just and equitable to grant Orders sought herein.

3. The Application is further supported by the affidavit of one Eric Gaku the Court Manager of the Respondent wherein he states that judgment in the matter was delivered on 11.5.2016, dismissing the claim save for Kshs. 8,000 plus costs of the suit.

4. That the Respondent was aggrieved by the award of costs to the Claimant and subsequently filed an application for review on 3.8.2016 which was to be heard on 28th November, 2016, on which the date it did not proceed as the Court was not sitting. They state that while the application was still pending the Claimant filed their Bill of costs for Kshs. 191,615/= which was taxed at Kshs.131,531/=.

5. That on 30th January, 2017, the Claimant instructed auctioneers to proclaim the Respondent's moveable property, worth more than Kshs. 141,981. They state that the application for review seeks to reverse the award of costs to the Claimant and will be rendered nugatory if the Claimant is allowed to proceed with execution.

6. The Applicant states that it is in the interest of justice if the orders sought are allowed so that they are afforded an opportunity to ventilate their application for review which would be rendered nugatory should execution proceed.

7. The Claimant/Respondent has opposed the application by filing grounds of opposition wherein they state that the application is misconceived and lacks merit as it is intended to delay the Claimant from enjoying the fruits of a judgment by this Court. Further that the application does not establish reasons that warrant a grant of the orders sought in law.

8. The Respondent states that the Applicant has not demonstrated that substantial loss will result if the Orders sought are not granted. Further that the Applicant has not offered to furnish security for due performance of the decree being stayed as a requirement for the grant of stay of execution.

9. That the Applicant is dragging its feet in prosecuting the review application and as such the Orders sought should not be granted.

Submissions

10. The Applicant submits that under Rule 32 (1) (a) (b) (c) (d) and (e) of the Industrial Court Procedure Rules, a party aggrieved by the award of the Honourable Court may seek review of the award, judgment or ruling if:-

- a. *There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the Order made; or*
- b. *On account of some mistake or error apparent on the face of the record; or*
- c. *On account of the award, judgment or ruling being in breach of any7 written law; or*
- d. *If the award, the judgment or ruling requires clarification; or*
- e. *For any other sufficient reasons.*

11. That the Applicant is aggrieved by the award of costs for reasons that:

1. *There is an error apparent on the face of the record*
2. *There is sufficient reason to review the order for costs.*

12. On error on the face of the record was discussed in the case of **Kishor Kumar Dhanji Vs Ndeffo Limited & 4 Others (2011) eKLR** where it was held:

“a mistake or error on the face of the record must be one that stares one in the face, as it were, and on which there cannot be two opinions.”

13. They submit that the phrase “plus costs of the suit” in paragraph 27 of the judgment is an error apparent on the face of the record since the Court in the previous paragraphs found that the Respondent/Applicant acted within the law and that the Claimant’s suit could not succeed save for Kshs. 8,000/=.

14. That based on the principles that costs follow the event there is sufficient reason to review the Judgment of 11.5.2016. They cite the case of **Orix (K) Limited vs. Paul Kabeu & 2 Others** it was held inter alia:

“The Court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant factors are present in this case and the Court would still have awarded costs to the Plaintiff, which I do.”

15. The Respondent/Applicant states that since it was the successful party in this case, it should not be condemned to pay costs and as such they pray for the application to be allowed as drawn.

16. The Claimant/Respondent in submissions submit that the Application for review is misconceived as they only filed it after the Claimant served them with the Bill of Costs dated 6.6.2016. They did not make submissions on the Bill of costs but instead filed this application for review. This, the Claimant states was an afterthought in view of the money sought in the Bill of costs. Further that on the date the bill of costs came before the Deputy Registrar the Respondent’s advocates raised the same issue in the application for review which were found not relevant and the Bill was taxed at Kshs. 131,531/=.

17. He also submits that the application for review is fatally defective as on the face of it, it does not state the order it seeks from the Court upon review of the Judgment. Further that the application does not raise any grounds that warrant a review as envisaged under Rule 32 of the Industrial Court Procedure Rules 2010.

18. The Claimant further submits that there is no error apparent on the face of the record as the Court considered the issues between the parties and evidence adduced and made an informed decision as such

the contention that the Respondent was the successful party and should not be condemned to pay costs is untrue.

19. It is also submitted on behalf of the Claimant that the Court has discretion in awarding costs in proceedings before it. They rely on the case of **Alfred Mutuku Muindi vs. Rift Valley Railways Limited (2015)eKLR** where it was held:

“Under section 12(4) of the Employment and Labour Relations Court Act it is provided that:- ‘in proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just’. The Couching of the provision gives the trial Court discretionary powers to award costs or not.”

20. That in awarding costs the Court in the instant case used its discretion to do so.

21. That the proposition that costs follow the event does not apply in this case as costs in the Employment and Labour Relations Court do not necessarily follow the event. They cite the case of **Hellen Waikunu t/a Dotsavvy Limited Vs Kenya Ports Authority (unreported)** where the Court held that under the then Industrial Court Act, costs are discretionary and do not follow the event.

22. They also cite the case of **Makana Asanyo Vs Nakuru Water and Sanitation Geoffrey Services Company Ltd & 8 Others (2015)eKLR** where it was held:

“The primary source of Court’s power to award costs is located in Section 12(4) of the Employment and Labour Relations Court Act... My understanding of the Section is that an order of costs is discretionary and should be made after evaluating what is just in the circumstances of each case. Just has been defined in the Concise Oxford English Dictionary, 12th Edition as, morally right and fair, appropriate or deserved, well founded... in my view, the Employment and Labour Relations Judge has been given a more wider discretion and latitude in awarding costs and in making that determination he may consider factors which the High Court Judge may not consider. Such factors may include the relationship between the litigants and even the financial position of the parties. And flowing from that understanding, my take is that costs do not follow the event, unlike the situation obtaining under the Civil Procedure Act, where Section 27(1) provides that... The Employment and Labour Relations Judge is under an obligation to consider what is just or what the justice of each case demands in making a costs order.”

23. The Claimant is also of the view that the application is an appeal against the Judgment of this Honourable Court disguised as a review application and as such should be dismissed. They cite the case of **National Bank of Kenya Vs Ndungu Njau (1997)eKLR** where it was held:

“A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

24. The Claimant prays for the application to be dismissed with costs.

25. Having considered the submissions of the parties, I am guided by Section 33 of Employment & Labour Relations Court (Procedure) Rules 2016 which provides as follows:

1) “A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling:-

a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

b) on account of some mistake or error apparent on the face of the record;

c) if the judgment or ruling requires clarification; or

d) for any other sufficient reason.

2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station”.

26. Other than the Employment & Labour Relations Court Rules, Section 12(4) of the Employment & Labour Relations Court Act states as follows:

“In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just”.

27. From the above provision, the Court can make a finding for payment of costs to a Litigant subject to the rules of the Court as it is also notable that such an award is discretionary as held in Geoffrey Makana Asanyo case (supra).

28. This Court in exercising its discretion to award costs in this case cannot be said to have erred. There is no error in my view apparent on the face of the record to warrant review. What the Applicants in my view seek from this Court is to ask Court to sit on appeal on its own judgment and this is not arena of this Court but in the purview of the Court of Appeal.

29. I find there is nothing to review accordingly. I dismiss this application with costs to the Claimants.

Read in open Court this 7th day of June, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ngome holding brief for Angaya for Claimant

Masese holding brief for Oyombe for Respondent – Present